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No. 789-37

In the Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRED MEYER, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 1, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–26a) is reported at 359 F. 2d 351. The opinion of the Federal Trade Commission (R. 59–142)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1966 (App. B, *infra*, 27a–30a). By orders

[1] "R." refers to the two-volume Transcript of Record in the court of appeals.

of Mr. Justice Douglas of September 30, 1966 and October 24, 1966, the time for filing a petition for a writ of certiorari has been extended to and including November 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Robinson-Patman Act.

2. Whether the court of appeals improperly modified the Commission's order by inserting in the portion of the order prohibiting the inducement or receipt of discriminatorily lower prices a specific recital of the statutory defenses to a charge of price discrimination.

The Commission asks the Court to review the second question only if it grants review of the second question presented in the petition for certiorari filed by respondents in No. 703, this Term. See *infra*, pp. 14–15.

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * *

where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 5(a) of the Federal Trade Commission Act, as amended by 66 Stat. 632, 15 U.S.C. 45(a), provides in part as follows:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After extensive proceedings, the Federal Trade Commission found that respondent Fred Meyer, Inc., and two of its officers (1) violated Section 2(f) of the Clayton Act by knowingly inducing certain suppliers of Meyer to grant it discriminatory prices illegal under Section 2(a) of the Act, and (2) violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain suppliers to grant Meyer promotional allowances illegal under Section 2(d) of the Clayton Act; and entered a cease-and-desist order.

Meyer (hereinafter "respondent") operates a chain of thirteen retail stores in the Portland, Oregon, area selling groceries, drugs, variety items, and a limited line of clothing. With sales exceeding $40 million in 1957, it was, during the relevant period, the second largest seller of all goods in the area (App. A, 1a; R. 60).

Since 1936, respondent has conducted, through the use of coupon books, a promotional advertising cam-

paign for one month of each year. For each promotion, it prints and distributes a 72-page book, each page of which features a single product and serves as a coupon for the purchase of certain amounts of such products at a specially reduced rate. The campaign involves a large promotion: about 140,000 books were used in 1957, and about 120,000 in 1958 (App. A, 2a; R. 62–64). Respondent finances the promotion by charging the supplier of each featured product a basic fee of $350. In addition, some of these suppliers give respondent price reductions based upon volume purchases, replace without charge goods that respondent has sold at special prices, or redeem coupons at an agreed rate (App. A, 2a; R. 64–67).

The evidence considered in the Commission proceedings related to transactions between the respondent and five of its suppliers, only four of which participated in the coupon-book program. The Commission found that the first $350 paid to respondent by each of four participating suppliers was a promotional allowance within the meaning of Section 2(d), and that the additional benefits granted by these suppliers [2] in connection with the program were price concessions within the purview of Section 2(a). It found that both Sections 2(d) and 2(a) had been violated since these suppliers had not granted the same

[2] In a subsequent, separate proceeding against one of these suppliers, the Commission found no injury to competition—a requisite for a Section 2(a) violation. It therefore did not rely in the court of appeals on the transactions between that supplier and respondent as part of its case relating to the price-discrimination charge against respondent. See App. A, 6a, n. 5.

promotional allowances and price concessions to other buyers of the same products who resold them in the Portland area; and that Section 2(d) had also been violated by a fifth supplier's granting respondent promotional allowances, not connected with the coupon-book program, which were not available to two other buyers reselling in the same area (App. A, 4a–11a; R. 61–76).

Some of the buyers disfavored by the suppliers were wholesalers who resold to retailers competing with respondent. The Commission ruled that these disfavored wholesalers were protected under Section 2(d) from discriminatory promotional allowances in favor of respondent even though respondent was not a wholesaler but a direct-buying retailer (R. 85–93). The Commission further found that respondent and its officers knew or had reason to know that the promotional allowances (Section 2(d)) and price concessions (Section 2(a)) given by the suppliers were discriminatory (App. A, 14a–21a; R. 103–136), and concluded that they had therefore violated Sections 5 and 2(f). The Commission's order specified that respondent could receive only those price concessions and promotional allowances granted wholesalers reselling to respondent's retail competitors[3] (App. A, 23a).

[3] The order consisted of two parts. One part enjoined violations of Section 2(f) of the Robinson-Patman Act, and the other part enjoined violations of Section 5 of the Federal Trade Commission Act. The Section 2(f) part of the order enjoined respondent and its officers from inducing price discriminations between respondent and other customers of the same supplier where respondent is "competing with the purchaser

The Court of Appeals for the Ninth Circuit upheld the Commission's findings that respondent had induced (1) price concessions which were illegal because they discriminated against certain other retail buyers and certain wholesale buyers, and (2) promotional allowances which were illegal because they were not made available to competing retail buyers. The court, however, reversed the Commission's ruling that respondent acted illegally in inducing promotional allowances that were not made available to wholesale buyers who sell to retailers with whom respondent competes. The court followed its prior decision in *Tri-Valley Packing Assn.* v. *Federal Trade Commission*, 329 F. 2d 694, 709, in which it had held that Section 2(d) does not apply if the favored and the disfavored buyers compete on different "functional levels," *e.g.*, if one is a wholesaler and the other a retailer.[4] The court also modified the Commission's

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paying the higher price or with a customer of the purchaser paying the higher price" (App. A, 23a). The Section 5 part enjoined respondent and its officers from inducing any promotional allowance not offered to other customers of the same supplier "competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products" (App. A, 23a).

[4] In *Tri-Valley* the court had relied upon a prior Commission decision, *Atalanta Trading Corp.*, 53 F.T.C. 565 (1956), reversed on other grounds, *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2), that Section 2(d) applied only if there was competition at the same functional level. The Commission took the same position in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250–253 (1959). The Commission in the present case acknowledged that it was overruling *Liggett & Myers* (R. 93).

order in certain respects (App. A, *infra*, 22a–26a; compare R. 56–58, 157, and App. B, *infra*, 27a–30a; see *infra*, pp. 14–15).

REASONS FOR GRANTING THE WRIT

1. Section 2(d) of the Robinson-Patman Act prohibits suppliers from giving promotional allowances to customers who distribute their products unless the allowances are made "available on proportionally equal terms to all other customers competing in the distribution of such products." In reversing in part the Commission's holding that respondent had violated Section 5 of the Federal Trade Commission Act by inducing promotional allowances from suppliers that were illegal under Section 2(d), the court of appeals held that the prohibition of the latter section does not extend to a supplier who gives to a retailer buying directly from it promotional allowances not made available to wholesalers who sell to other retailers directly competing with the favored retailer, on the ground that the disfavored wholesalers were not "customers competing in the distribution" of the supplier's goods. This ruling, we submit, is erroneous and, if allowed to stand, would create a serious loophole in the congressional design in the Robinson-Patman Act "to curb and prohibit all devices by which larger buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168.

(a) Read in the light of the congressional purpose to protect small buyers against the "discriminatory

preferences" which large buyers can obtain "by virtue of their greater purchasing power" (*Broch, supra*), the Commission's interpretation of Section (2)(d) was correct. That section prohibits discriminatory allowances not made available to all other "customers competing in the distribution" of the discriminating seller's products. The suppliers in this case used two different channels by which they distributed their products to retailers. In the case of respondent, a large buyer, they sold directly. In other instances they sold initially to wholesalers who, in turn, resold to other, and presumably frequently smaller, retailers. Respondent competed with the retailers who purchased through the wholesalers (R. 94–95), and any allowance given to respondent that was not made available to the wholesalers necessarily would subject the other retailers to competitive injury. As the Commission noted, "And if the wholesaler is denied promotional allowances received by respondents, it obviously cannot pass them on to its retailer-customers or use them for the benefit of those customers" (R. 89–90).

Giving the words of the statute their reasonable meaning in the light of the legislative purpose, the wholesalers are "customers competing in the distribution" of the suppliers' products. They admittedly are "customers," and they are "competing in the distribution" of the suppliers' products because, by serving as a necessary nexus between the suppliers and the retailers, they are the conduit through which the sup-

pliers distribute their products. As the Commission explained (R. 89):

> * * * It is true, of course, that only the retailer-customers of these two wholesalers compete with respondents in the direct resale of the goods to consumers. But the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale." These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market.

In other words, in the circumstances of this case the wholesalers and their retailers form a network of distribution that competes with direct-buying retailers. The fact that the direct-buying retailer chooses not to buy through wholesalers does not remove it from competition with both the wholesaling and the retailing portions of the competing product distribution network.

The court of appeals' narrowly literal reading of Section 2(d)—that it does not cover such discriminatory promotional allowances because the wholesalers and the favored retailer-respondent are not "competing" with each other in the sense that they directly serve the same customers—not only disregards the important public policy goal that this remedial statute

was intended to serve, but creates a serious anomaly within the statute itself.

This Court long ago established that the Robinson-Patman Act prohibits price discrimination in favor of a direct-buying retailer against a wholesaler who resells to retailers competing with the direct-buying retailer, regardless of the different functional levels on which they might be viewed as competing. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55. Promotional allowances, of course, are but an indirect form of price discrimination, and Congress hardly could have intended to sanction the very type of discrimination that it prohibited as a price concession under Section 2(a) when accomplished as a promotional allowance under Section 2(d). Rather, Congress intended Section 2(d) to prevent the circumvention of the general prohibition of Section 2(a) by the use of promotional allowances instead of outright price concessions. *Krug* v. *International Telephone and Telegraph Corp.*, 142 F. Supp. 230, 236 (D. N.J.). Rowe, *Price Discrimination under the Robinson-Patman Act*, 365 (1962). See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68.[5]

In the light of these considerations, the difference in language between Sections 2(a) and 2(d)—the former forbids price discrimination whose effect is to lessen

[5] Compare *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687 (C.A. 2), certiorari denied, 305 U.S. 634, in which the court held that Section 2(c) of the Act (dealing with brokerage fees) was designed to prevent the circumvention of the prohibition of Section 2(a) by the use of discriminatory brokerage fees instead of outright price concessions.

competition with the person granting or receiving the discrimination "or with customers of either of them," and the latter prohibits promotional allowances not available to "customers competing in the distribution" of the seller's product—does not justify the much narrower scope which the court of appeals' decision gives to Section 2(d).[6]

The court of appeals' interpretation of Section 2(d) creates the further anomaly that it would forbid discrimination between two large direct-buying retailers but would allow discrimination between large direct-buying retailers and small retailers who buy through wholesalers. Such small retailers, however, most need the protection of the Robinson-Patman Act and were intended by Congress to have it. As the

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[6] As the Commission noted, while Section 2(a), unlike Section 2(d), "specifically describes the several levels of 'competition' to be protected (competition with the giver and the receiver of the lower price, 'or with customers of either of them'), that description sets forth not the elements of a price discrimination—which 'is merely a price difference', Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960)—but the 'effects' that must appear before the 'discrimination' will be deemed harmful enough to warrant the laying on of the laws [sic] restraining hand. Hence that language, although it supported the Court's conclusion in Morton Salt, supra, that the 'difference' between the price charged the favored retailer and the nonfavored wholesalers amounted to a price 'discrimination', was not essential to it. The same result would doubtless have been reached if the draftsmen of Section 2(a), while retaining its present description of the offense of 'discrimination', i.e., 'discriminate in price between different purchasers', had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (R. 90–91).

Commission explained in rejecting the construction adopted by the court below (R. 87):

> * * * [I]n a geographical market served by, say, two direct-buying "chains," and one wholesaler with 100 retailer-customers, a supplier who gave a promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who, as the instant record clearly shows, need its protection very badly indeed.

(b) The question is an important and continuing one in the administration of the Robinson-Patman Act which this Court should resolve, even though no conflict among circuits exists. Since review of Commission orders under the Clayton Act and the Federal Trade Commission Act may be had in any circuit in which the company "resides or carries on business" (15 U.S.C. 21(c), 45(c)), any firm that does business on the West Coast—and most major American firms plainly do—can channel any review proceedings of further Commission orders involving this question into the Ninth Circuit. Indeed, the Commission recently reaffirmed its position on this issue in *Clairol, Incorporated* (Federal Trade Commission Docket No. 8647, decided June 24, 1966), and a petition to review its order in that case has been

filed in the Ninth Circuit (No. 21235). Thus, the likelihood of a conflict developing on this important issue seems remote; as long as the decision of the court of appeals stands, however, it is bound to have an important, and we believe seriously adverse, impact upon the administration of the Act.

2. The court of appeals made one modification in the Commission's order that the Commission considers erroneous. We do not believe, however, that the correctness of this modification, standing alone, presents an issue warranting review by this Court. In their petition in No. 703, this Term, however, respondents, in addition to challenging certain aspects of the merits of the Commission's decision, also attack the modified order as unduly broad. Although we intend to oppose the petition in No. 703, we submit that, if the Court should grant that petition with respect to the scope of the order (the second question presented), it should also review the modification here mentioned.

The court of appeals inserted in the portion of the Commission's order prohibiting the receipt of illegal price concessions a specific reference to the various statutory defenses to a charge of granting such concessions. Thus, for example, the court's order bars respondents from knowingly receiving or inducing any discriminatory price they "know or should know is * * * (d) not a price made in good faith to meet an equally low price of a competitor of the seller" (App. B, *infra,* 28a–29a). To the extent that this modification merely reflects the court's wish to make explicit what is implicit in every such order (*Federal*

Trade Commission v. *Ruberoid,* 343 U.S. 470, 476) (App. A, *infra,* 25a), it is superfluous. On the other hand, the modification could be read as imposing upon the Commission, in a penalty proceeding for alleged violations of the order, the burden of proving not only that respondents received illegal price concessions but also that they knew or should have known that the statutory defenses were not available to the seller. The Commission does not believe that, in an enforcement proceeding relating to the receipt of illegal concessions, it is required to assume the latter burden. In any event, this provision of the order as thus modified is sufficiently ambiguous so that it is likely to create problems in future enforcement proceedings.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be granted.

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